86 1785

No. _____

In The

Supreme Court of the United States

October Term, 1986

MICHAEL COHL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED

I.

WHETHER THE GOVERNMENT'S FAILURE TO DISCLOSE MATERIAL EXCULPATORY INFORMATION UNTIL JURY DELIBERATIONS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

II.

WHETHER A DISTRICT COURT, PRIOR TO SENTENCING, ENTRY OF JUDGMENT, AND APPEAL, RETAINS JURISDICTION TO RE-CONSIDER THE DENIAL OF A MOTION FOR NEW TRIAL.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding before the United States Court of Appeals for the Sixth Circuit were as follows:

(1) United States of America — Plaintiff-Appellee;
(2) Michael Cohl — Defendant-Appellant;
(3) Charles Gregory, Sr. — Defendant-Appellant; and,
(4) Sanford Cohl — Defendant-Appellant.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, MICHAEL COHL, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The orders of the court of appeals affirming Petitioner's conviction (App. A, *infra*, A-1 – A-4) and denying rehearing (App. B, *infra*, B-1) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1987. (App. A, *infra*, A-1). A petition for rehearing was denied on March 6, 1987. (App. B, *infra*, B-1). This petition is being filed within sixty (60) days of that date as required by Supreme Court Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

Rule 33 of the Federal Rules of Criminal Procedure provides:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

1. Petitioner was indicted in the United States District Court for the Eastern District of Michigan. A superseding indictment alleged the involvement of Petitioner and seven others in the interstate transportation of stolen property having a value in excess of $5,000, *i.e.*, stainless steel ingot butts.[1] A jury trial began on April 30,

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[1] Count One of the indictment alleged a conspiracy to transport stolen property, with a value in excess of $5,000, in interstate com-

(*concluded on page 3*)

1985 and concluded with Petitioner being found guilty on 15 of the 20 counts charging him.[2]

Petitioner was sentenced on January 17, 1986 to a custody term of four years on each count, the sentences to run concurrently. He was also ordered to pay a committed fine of $2,000 on each count, for a total fine of $30,000. (C.A. 75)

An unsecured appeal bond was granted at the time of sentencing. (C.A. 75) On April 8, 1987, the district court continued the unsecured bond pending application for certiorari. The district court found the application presented a "substantial question" of law likely to result in reversal, or an order for new trial, within the meaning of 18 U.S.C. § 3143(b).

2. Petitioner, his brother Sanford Cohl, and William Gregory, Sr. owned SMC Hauling Co. ("SMC"). On October 9, 1978, SMC entered into a contract with the Jones & Laughlin Steel Co. ("J&L") in Warren, Michigan. SMC was required to remove the slag (the impurities that rise to the top of the metal during the steel making process) from J&L and take it to SMC's dumpsite. The entire cost of manpower, dumptrucks, the dumpsite, and all other expenses were to be borne by SMC. In ex-

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(*continued from page 2*)

merce, in violation of 18 U.S.C. §§ 371 and 2314. Counts Two through Twenty each alleged an interstate transportation of stolen property having a value in excess of $5,000. Petitioner was charged in all twenty counts.

[2] Petitioner and co-defendant Charles Gregory, Sr. were convicted on Counts One-Six and Eight-Sixteen. They were acquitted on Counts Seven and Counts Seventeen-Twenty. (C.A. 75-76) Co-defendant Sanford Cohl was convicted on Counts One-Three and acquitted on Counts Four-Six. (C.A. 74) Judgments of acquittal were entered as to co-defendants Chester Harris and Saul Tugal. (T. 5/28/85 62, 82-83) ("C.A." refers to the Appendix filed in the court of appeals. "T." refers to the trial transcript.)

change, SMC could pick over the slag and remove steel left in the slag during J&L's steelmaking process. The amount and size of the steel that J&L could remove from the slag prior to its being picked up by SMC was to be determined by "historically, past-established practice." (C.A. 787-793)

This case arose because of removal of "ingot butts" by SMC from J&L. During the stainless steel making process at J&L, melted steel was poured into molds to make "ingots" which averaged approximately 12½ tons each. Six to eight ingots were produced in a "run". Melted steel that was left after a "run" was poured into a mold to form a partial "ingot", called an "ingot butt". (T. 4/30/85 202-203)

The government established that a number of "ingot butts" had been removed by SMC from J&L. Joseph Piccioni and Robert Visokey, J&L's plant managers, testified that SMC was not entitled to remove these ingot butts under its contract with J&L. (T. 5/1/85 85; 5/2/85 19, 22) It was also established that SMC was making payments of from $500 to $2,000 to Ronald Schmidt, Evraisto Nino and Wallace Gutowski, J&L employees responsible for loading the ingot butts on SMC's trucks. (T. 5/2/85 112; 5/3/85 108-111)

Petitioner and his co-defendants did not deny that ingot butts were being removed from J&L by SMC, or that payments were being made to J&L personnel. They maintained, however, that SMC was entitled to the ingot butts under its contract with J&L. There was testimony that ingot butts had been removed with the slag taken from J&L since the early 1970's, when Varney Trucking Co. hauled the slag. (T. 5/28/85 137) It was also established that Petitioner and his co-owners at SMC had repeatedly asserted their right under the contract, to J&L management, to any metallic pieces that could be

handled by the loader, *i.e.*, any pieces under 15 tons in weight. (T. 5/1/85 102-104, 126-128) Petitioner and his co-defendants did not deny the payments to J&L personnel, but maintained they acceded to the demands for "gifts" to receive the steel that had historically been included in the slag and to which they were entitled under the contract. In addition to the cash payments to Schmidt, Nino, and Gutowski, evidence established that top management at J&L was also receiving "gifts" from SMC. Given to J&L management were television sets, gold coins, golf clubs, firearms, trips, expensive crystal, and numerous other "gifts". (T. 5/1/85 95-98, 208-210; 5/3/85 214-237)

Motions for judgment of acquittal, arguing insufficient proof that SMC was not entitled to the ingot butts under the contract with J&L, were denied. Although finding that there were "very close questions of fact", the district court held that the testimony of J&L management that ingot butts were not included in the contract was sufficient to create an issue of fact for the jury. (T. 5/29/85 84-85)

3. To establish that $5,000 in stolen ingot butts had been transferred in interstate commerce, as required for conviction on each count, the government relied on invoices of sales and the testimony of Norman Reese.

Invoices from various out-of-state sales of steel between December, 1979 and November, 1981 were introduced. These documents showed sales on 19 occasions in amounts from $5,742 to $11,980 (C.A. 799-957)

The government relied on Norman Reese to establish that the various shipments were of ingot butts rather than of some other scrap metal or of a combination of ingot butts and other scrap metal. As foreman at SMC, Reese had supervised the various shipments. He testified

pursuant to an immunity agreement with the government. (T. 5/21/85 115, 156) Although admitting he could not remember the individual shipments, Reese used the weights on the invoices to testify about the composition of the various loads. He testified that each of the loads contained ingot butts; he referred to them as "ingots" and "butt ends". (T. 5/22/85 67-90) Reese denied that any of the loads could contain a combination of ingot butts and "caps", another form of stainless steel that SMC acquired from the J&L slag. He claimed that they did not mix ingot butts and caps in the loads that went out of state. (T. 5/22/85 178, 182)

4. Jury deliberations began on May 31, 1985. (T. 5/31/85 230) On June 5, 1985, counsel convened in response to a note from the jury. The response to this note was concluded at 9:10 a.m. The jury returned its verdict at 10:45 a.m. (T. 6/5/85 5) At some point prior to the return of the verdict, the prosecutor admitted that Norman Reese had changed his testimony, with respect to the invoices, from an earlier time when he had told the government that the "loads" were something different than what he told the ~~jury~~. (Motion for New Trial, C.A. 94) The prosecutor subsequently admitted that Reese had previously told them, during two conversations prior to trial, that ingot butts and caps were mixed in out-of-state loads. Further, Reese had specifically identified a number of loads that were the subjects of the indictment as containing, in whole or in part, stainless steel caps. (Government's Answer in Opposition to Defendants' Motion for New Trial, C.A. 116)

5. During the stainless steel making process, the impurities, referred to as "slag", rise to the top. The slag is poured off into a slag pot. Any metal within the slag goes to the bottom of the slag pot. When it solidifies it is referred to as a "cap". (T. 4/30/85 207-208) Caps were

part of the J&L refuse stream. They were a part of the pit scrap that was indisputedly a part of the contract between SMC and J&L. (T. 5/2/85 22) There was testimony that J&L should have retained the "large" caps and that they should not have gone to SMC under the contract. (T. 5/1/85 192-193) There was, however, no evidence that SMC received any caps from J&L to which they were not entitled.

The invoices in this case established the shipments of stainless steel with values from approximately $5,000 to $11,000. If the shipments all contained only stolen steel (*i.e.*, ingot butts), the $5,000 jurisdictional amount was met. If, however, the shipments contained some stolen steel and some steel that was not stolen (*i.e.*, caps), without any real evidence as to what each shipment contained, there would not be sufficient proof of the $5,000 amount.

6. The district court initially denied Petitioner's motion for a new trial.(T. 7/22/85 32-33) However, after having an opportunity to consider the decision of this Court in *United States* v. *Bagley*, 473 U.S. __, 105 S.Ct. 3375 (1985), the district court concluded that the withholding of the exculpatory information concerning the testimony of Norman Reese required the granting of a new trial. (T. 8/8/85 1-2; C.A. 127)

On November 12, 1985, the district court withdrew the order of a new trial. This order was not based on any belief by the court that a new trial was not required by due process. Rather, the district court accepted the government's argument that, having initially denied the motion for new trial, there was no longer jurisdiction in the district court to grant a new trial. (App. D, *infra*, D-1)

7. The court of appeals affirmed Petitioner's conviction in an unpublished per curiam order. The court,

without explanation, stated that Petitioner and his co-defendants had "failed to demonstrate . . . the materiality of, or prejudice from, the tardy disclosure." (App. A, *infra*, A-2). The court of appeals also concluded that the district court had no authority to grant a new trial "in the absence of a motion from a defendant." (*Id.*). The court of appeals did not discuss the effect of the motion for new trial that had been timely filed.

REASONS FOR GRANTING THE PETITION

1. This Court has repeatedly emphasized that due process is violated when the prosecutor obtains a conviction aided by the failure to disclose exculpatory evidence. The Court has never, however, considered the time at which the disclosure of exculpatory evidence must be made. This case, involving disclosure of material exculpatory evidence during the fourth day of jury deliberations — and shortly before the verdict was returned — presents an opportunity for this Court to provide some guidance regarding the time at which disclosure must be made.

a. In a series of cases, this Court has held that due process is violated by the prosecutor's deliberate solicitation of false testimony, the prosecutor's failure to correct false testimony, and the prosecutor's withholding of exculpatory evidence. The inaction of the prosecutor here, in the face of testimony he knew differed significantly from earlier statements, denied Petitioner the due process of law that the cases of this Court had guaranteed to him.

This Court first held that "a deliberate deception of Court and jury by the presentation of testimony known to be perjured" violated the due process requirement in *Mooney* v. *Holohan*, 294 U.S. 103, 113 (1935). In *Pyle* v.

Kansas, 317 U.S. 213 (1942), the Court held allegations of the knowing use of perjured testimony, and suppression of favorable testimony, if proven, would be a violation of the Constitution. Likewise, a judgment of conviction was reversed in *Alcorta* v. *Texas*, 355 U.S. 28 (1957), when the prosecutor elicited testimony he knew was untrue and failed to disclose exculpatory evidence.

More recently, the Court has emphasized the prosecutor's duty to correct false testimony even if he did not solicit it. In *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), the Court held that due process was violated where the prosecutor "although not soliciting false evidence, allows it to go uncorrected when it appears." The *Napue* holding was reaffirmed in *Giglio* v. *United States*, 405 U.S. 150 (1972), where the Court held that a defendant is entitled to a new trial if he can establish that the prosecutor intentionally or inadvertently failed to correct materially false testimony relevant to the credibility of a key government witness.

b. The prosecutor in this case was informed, prior to trial, that witness Norman Reese maintained that loads of stainless steel contained both ingot butts and caps. Indeed, apparently believing SMC was not entitled to caps, the prosecutor alleged that various shipments contained caps in the superseding indictment. (Counts Four, Five, Six, Eight and Eleven; C.A. 26) When the proofs failed to establish that any caps were illegally removed from J&L, however, the prosecutor elicited, without any attempt at correction, testimony from Reese, that each of the shipments contained only ingot butts. (T. 5/22/85 67-90) During cross-examination, the prosecutor remained silent while Reese expressly denied that any of the loads contained both ingot butts and caps. (T. 4/22/85 178, 182)

Reese was an important witness for several reasons. As the person who made payments to Nino, Schmidt and Gutowski, he was in a unique position to help characterize the payments as being a bribery for providing stolen steel, as claimed by the prosecutor, or as being part of the cost of doing business with J&L and a demand that had to be met to obtain the steel that SMC was entitled to receive, as maintained by the Petitioner. Reese was also important, as to co-defendant Sanford Cohl, because he was the only witness to suggest that Sanford Cohl was even aware of the payments to J&L employees. Most importantly, however, Reese was the only witness who provided substantial testimony regarding the various shipments of steel in interstate commerce.

Reese admittedly did not recall the individual shipments. If some of the shipments contained mixtures of butt ends and caps, Reese's ability to identify any particular shipment as containing over $5,000 worth of butt ends became highly questionable.

A reasonable probability existed that, had Reese's earlier statement been disclosed, the result of the trial would have been different. The evidence was "material" within the meaning of *United States* v. *Bagley*, 473 U.S. __, 105 S.Ct. 3375 (1985). The district court, after reviewing the *Bagley* decision, held that there was a probability of a different outcome sufficient to undermine confidence in the verdict and granted a new trial.

c. This Court has never considered the question of when exculpatory material must be provided to a defendant. The courts of appeals, however, have considered the question a number of times, with mixed results. See *e.g.*, *United States* v. *Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976) ("Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation

and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure"); *Grant* v. *Alldredge*, 498 F.2d 376 (2nd Cir. 1974) (failure to provide pre-trial disclosure of exculpatory material required a new trial); *United States* v. *Murphy*, 569 F.2d 771 (3rd Cir. 1978) (government may be required to produce exculpatory material prior to the time disclosure required by the Jencks Act); *Hamric* v. *Bailey*, 386 F.2d 390 (4th Cir. 1967) (disclosure must be made at a time when the disclosure will be of value to defendant); *United States* v. *McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985) ("If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been"); *United States* v. *Moore*, 439 F.2d 1107, 1108 (6th Cir. 1971) ("*Brady* was never intended to create pretrial remedies"); *United States* v. *Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979) ("As long as ultimate disclosure is made before it is too late for the defendants to make use of any benefits of the evidence, Due Process is satisfied"); *Blake* v. *Kemp*, 758 F.2d 523, 532, n. 10 (11th Cir. 1985) (under some circumstances exculpatory information must be disclosed pretrial); see also, ABA Standards for Criminal Justice, § 3-3.11(a) (2d ed. 1982) (disclosure required "at earliest feasible opportunity").

d. The opinion of the court of appeals states that "no effort was made by defense counsel before the jury returned its verdict to either reopen the case, or to have the trial court declare a mistrial." (App. A, *infra*, A-2). The suggestion that defense counsel has waived Petitioner's rights by failing to act during the jury deliberations, never raised before the district court, is not convincing.

First, the record does not disclose that Petitioner's counsel was made aware of the specific information that Norman Reese had previously provided the prosecutor until the filing of the government's response to the motion for new trial, filed after the return of the verdict. The only disclosure prior to the verdict was the general admission by the prosecutor that Reese had changed his testimony with respect to the loads from what he had earlier informed the government. See "Motion for New Trial". (C.A. 94) Even if Petitioner's counsel had been fully advised of the specifics regarding Reese's earlier statement, however, it was far too late to correct the prosecutor's actions.

The decision of the court of appeals here is in direct conflict with that reached in *Hamric* v. *Bailey*, 386 F.2d 390 (4th Cir. 1967). In *Hamric*, disclosure of exculpatory evidence also occurred after the jury began deliberations. Habeas relief was granted:

> Finally, on the issue of suppression, we conclude that disclosure of the undisclosed evidence after the jury had retired was too late to overcome the requirements of *Brady*. If it is incumbent on the State to disclose evidence favorable to an accused, manifestly, that disclosure to be effective must be made at a time when the disclosure would be of value to the accused. Possibly the jury's deliberations could be interrupted for the purpose of taking additional testimony, but the potential prejudicial effect to an accused of such an extraordinary procedure persuades us that *Brady*, to be given vitality, must be interpreted to require disclosure, at least, before the taking of the accused's evidence is complete.

Hamric v. *Bailey*, *supra* at 393.

e. Petitioner requested disclosure of exculpatory evidence both before and during his trial.

Prior to trial, the district court ordered the prosecution to provide all exculpatory information within its possession to the defendants "on a continuing basis." The prosecution did not oppose this order. (T. 3/12/85 99)

While Norman Reese was testifying, Petitioner's counsel again requested disclosure of exculpatory evidence. Petitioner's counsel, prophetically stating his fear that the prosecutor's perception of his duties under *Brady* v. *Maryland*, 373 U.S. 83 (1963) were "fundamentally flawed", specifically requested any exculpatory information contained within statements to the prosecutor that were not reduced to writing. (T. 5/22/85 7, 15) Earlier, the prosecutor had informed the court that he had reinterviewed many witnesses in preparation for trial and had "extended the courtesy" of telling defense counsel statements that had come to their attention during these interviews. (T. 5/2/85 27) With respect to his interview of Norman Reese, however, the prosecutor elected to wait until well into jury deliberations to first "extend the courtesy" of telling counsel of highly exculpatory information.

The disclosure here was too little and too late. The government utterly failed to meet its due process obligations. It should not have been permitted, in the court of appeals, to shift the blame to Petitioner's counsel and, in so doing, to deny Petitioner his constitutionally guaranteed fair trial.

2. The courts below held a denial of a motion for new trial could not be reconsidered by the district court. This holding is unsupported by statute, court rule, caselaw, or arguments of public policy. It is contrary to the

established right of a court to reconsider an erroneous order prior to sentencing, entry of judgment and appeal.

The district court initially denied Petitioner's timely-filed motion for new trial. (T. 7/22/85 32-33) The denial occurred without the court having the opportunity to consider *United States* v. *Bagley*, 473 U.S. __, 105 S.Ct. 3375 (1985). After reconsidering the importance of the undisclosed information, and considering the *Bagley* opinion, a new trial was granted. (T. 8/8/85 1-2; C.A. 127)

Had the district court originally granted a new trial, the court would, of course, have been permitted to reconsider its order and later deny the new trial. The court would have been free to do so until jeopardy attached at the new trial. See, *e.g.*, *United States* v. *Spiegel*, 604 F.2d 961 (5th Cir. 1979); *United States* v. *Spinella*, 506 F.2d 426 (5th Cir. 1975); *United States* v. *Arrington*, 757 F.2d 1184 (4th Cir. 1985).

A district court does not have authority to grant a motion for new trial in the absence of a motion from the defendant. See, *e.g.*, *United States* v. *Green*, 414 F.2d 1174 (D.C. Cir. 1969); *United States* v. *Vanterpool*, 377 F.2d 32 (2nd Cir. 1967); *United States* v. *Brown*, 587 F.2d 187 (5th Cir. 1979); see also, Fed.R.Crim.P. 33. This is because a defendant should not be forced into a second trial, even if convicted at the first trial, if he does not want a new trial. Indeed, double jeopardy protections would likely protect a defendant from the second trial. Here, however, Petitioner moved for a new trial. He could hardly claim that he did not want the trial or that double jeopardy interests were violated.

The district court's reconsideration of the denial of the new trial motion occurred prior to sentencing, entry of judgment or appeal. Compare *United States* v. *Smith*, 331

U.S. 469 (1947) (court could not reconsider denial of new trial motion after appeal; appellate opinion would become merely "advisory"). No reason exists in law or logic to deny the district court the authority to do so.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 4, 1987

APPENDICES

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APPENDIX A

OPINION

(United States Court of Appeals for the Sixth Circuit)

(Filed January 19, 1987 — John P. Hehman, Clerk)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

(UNITED STATES OF AMERICA, **Plaintiff-Appellee**, v. MICHAEL COHL (86-1127), CHARLES GREGORY, SR. (86-1128), SANFORD COHL (86-1129), **Defendants-Appellants** — **ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN — **Nos. 86-1127; 86-1128; 86-1129**)

BEFORE: **KENNEDY** and **NORRIS**, Circuit Judges; and **CONTIE**, Senior Circuit Judge.

PER CURIAM. *NOT FOR PUBLICATION*

Defendants appeal from their convictions resulting from charges of conspiracy and transportation of stolen goods in interstate commerce. In essence, defendants were charged with participating in a scheme which involved bribing employees of a steel company to furnish defendants with valuable stainless steel ingots and butts, to which they were not entitled under a slag-hauling contract between the steel company and a hauling company owned and operated by defendants, and then selling that steel in interstate commerce.

All defendants contend that the government's failure to furnish them an alleged inconsistent and exculpatory statement made by a government witness, Norman Reese, entitles them to a new trial, citing *Brady* v. *Maryland*, 373 U.S. 83 (1963). Defendants' contention arises out of a conversation they say occurred between defense counsel and government attorneys, while the jury was deliberating, in which the latter advised the former that Reese's testimony, that ingot butts and caps were never mixed in a load, was different from the version of the facts he had given the government and which had served as the basis for the counts of the indictment which detailed mixed loads.

However, as defense counsel concede, this revelation was made in the course of an off-the-record conversation and no attempt was made to preserve the conversation in the record. Furthermore, no effort was made by defense counsel before the jury returned its verdict to either reopen the case, or to have the trial court declare a mistrial. Accordingly, defendants have failed to demonstrate either the error they seek to raise, or the materiality of, or prejudice from, the tardy disclosure. *See, e.g., United States* v. *Holloway*, 740 F.2d 1373 (6th Cir.), *cert. denied*, 469 U.S. 1021 (1984).

Nor is the issue raised by all defendants, that the district court erred in vacating its *sua sponte* order which had the effect of granting a new trial, well taken. The district court correctly comprehended its inability to grant a new trial in the absence of a motion from a defendant. *See* 3 C. Wright, *Federal Practice and Procedure* § 551 (West 1982); Fed. R. Crim. P. 33 advisory committee's note (1966 amendment).

Defendant Sanford Cohl contends that the trial court erred in overruling his motion for judgment of acquittal, as there was insufficient evidence of guilt to sustain a conviction on the charges against him.

> In testing the sufficiency of the evidence to withstand a motion for judgment of acquittal, the trial judge does not pass upon the credibility of the witnesses or the weight of the evidence. On the contrary, he must view the evidence and the inferences that may justifiably be drawn therefrom in the light most favorable to the Government. If, under such view of the evidence he concludes that a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion should be overruled and the issue left to the jury. It is only where under such view of the evidence he concludes there must be such a doubt in a reasonable mind, should the motion be granted. (Citations omitted.)

United States v. *Conti*, 339 F.2d 10, 13 (6th Cir. 1964).

In reviewing the denial of a motion for judgment of acquittal, the test to be applied by this court is whether reasonable minds could reach different conclusions on the issue of whether the defendant was guilty beyond a reasonable doubt. In other words, it is only where reasonable minds could not fail to find reasonable doubt that a reviewing court may reverse the district court's denial of the motion.

In view of the testimony of Norman Reese concerning Sanford Cohl's direct involvement in the scheme and of his knowledge of business transactions, other evidence that Cohl was present during contract negotiations and was involved in the day-to-day operation of companies which dealt with the shipments, and the inferences of guilt which reasonably may be drawn from that evidence, we are unable to say that reasonable minds

could not find Sanford Cohl guilty beyound a reasonable doubt.

Accordingly, the judgments are **affirmed**.

ISSUED AS MANDATE: March 17, 1987

COSTS: NONE

(*Certification Omitted*)

APPENDIX B

ORDER DENYING REHEARING

(United States Court of Appeals for the Sixth Circuit)

(Filed March 6, 1987 — John P. Hehman, Clerk)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL COHL (86-1127), CHARLES GREGORY, SR. (86-1128), SANFORD COHL (86-1129), Defendants-Appellants — No[s]. 86-1127/8/9)

BEFORE: KENNEDY and NORRIS, Circuit Judges, and CONTIE, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

APPENDIX C

ORDER DENYING NEW TRIAL

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed July 23, 1985)

(UNITED STATES OF AMERICA, Plaintiff, -vs- MICHAEL COHL, ET AL., Defendants — CRIMINAL NO. 84-20539; HONORABLE ANNA DIGGS TAYLOR)

At a session of the United States District Court at the Federal Building and United States Courthouse, Detroit, Michigan, on July 23, 1985.

PRESENT: HONORABLE ANNA DIGGS TAYLOR,
United States District Judge

This matter having come before the Court on defendants' Motion for a New Trial, the Court being duly advised in the premises and finding that there is no reasonable probability that the questioned non-disclosed evidence would have affected the outcome of the trial,

Now, therefore, IT IS ORDERED that defendants' motion be and hereby is denied.

/s/ HONORABLE ANNA DIGGS TAYLOR
United States District Judge

Entered: July 23, 1985

APPENDIX D

ORDER SETTING ASIDE PREVIOUS ORDER DENYING NEW TRIAL, AND GRANTING SAME

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed August 12, 1985)

(UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL COHL, SANFORD COHL, CHARLES GREGORY, Defendants — Criminal No. 84-20539; Hon. ANNA DIGGS TAYLOR)

At a session of said Court held in the Federal Building, Detroit, Michigan, on: August 12, 1985.

Present: Hon. ANNA DIGGS TAYLOR,
U.S. DISTRICT JUDGE

This matter having originally come before the Court on the Motion for New Trial filed by Defendants MICHAEL COHL, SANFORD COHL and CHARLES GREGORY, and the Court having denied said motion by Order dated July 23, 1985; and

The Court having reconsidered the issue raised in Defendants' Motion for New Trial *sua sponte*; and

The Court having reconvened the parties in open court on August 8, 1985, for the purpose of stating its decision on reconsideration;

NOW THEREFORE, for the reasons stated on the record in open court on August 8, 1985,

IT IS HEREBY ORDERED that the Court's previous Order denying Defendants' Motion for New Trial is

hereby set aside, and that the Defendants' Motion for New Trial be, and the same is hereby granted.

/s/ ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX E

ORDER GRANTING GOVERNMENT'S MOTION FOR RECONSIDERATION AND VACATING ORDER GRANTING NEW TRIAL

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated November 12, 1985)

(UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL COHL, et al., Defendants — CASE NO. 84 20539; HONORABLE ANNA DIGGS TAYLOR)

On June 5, 1985, defendants Michael and Stanley [*sic*, Sanford] Cohl and Charles Gregory, Sr. were convicted of conspiracy to transport stolen property in interstate commerce and multiple counts of transporting stolen property in interstate commerce. On June 19, 1985, after a request for an extension of time to file a motion for new trial was granted, defendants filed a motion for new trial alleging that the government had failed to disclose the substance of an inconsistent oral statement of Norman Reese, the prosecutor's main witness. Federal Rule of Criminal Procedure 33 provides in part that:

> [t]he court on motion for a defendant may grant a new trial to him if required in the interest of justice . . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within 7 days after verdict

> or finding of guilty or within such further time as the court may fix during the 7-day period.

The prosecution opposed the motion on July 1, 1985 and asserted that the non-disclosure did not deprive defendants of a fair trial and the information would only provide cumulative impeachment material since Reese had been extensively impeached at trial.

On July 22, 1985 the court heard oral argument on defendants' motion and found that the information would not have affected the outcome of the trial. An appropriate order was entered on July 23, 1985.

At the request of the court, counsel for both parties appeared in open court on August 8, 1985. The court advised counsel that it had, since entry of its last order, determined to grant reconsideration of its July 23rd order, based upon *United States* v. *Bagley*, 105 S.Ct. 3355 (1985), which holds that "suppression of [Brady] evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial . . . and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence of the outcome of the trial." The court announced its conclusion that the evidence withheld did indeed undermine its confidence that defendants would nevertheless have been convicted, granted defendants' prior motion and ordered a new trial. The order was entered on August 12, 1985.

The prosecution filed this motion for reconsideration of the decision to grant a new trial on August 23, 1985. The prosecution contends that the court erroneously *sua sponte* ordered a new trial. *Sua sponte* orders of a new trial are prohibited, it argues. *See United States* v. *Smith*, 331 U.S. 469, 475 (1947). In addition, the notes of the advisory committee indicate that "[t]he amendments to

the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant."

Defendants argue that the government's motion is untimely under Eastern District of Michigan Local Rule 17(k)(1). Rule 17(k)(1) states that "any motion to alter or amend a judgment and any motion for rehearing or reconsideration shall be served no later than 10 days after entry of such judgment or order." Defendants further aver that the court correctly granted a new trial in accordance with the *Bagley* decision. The prosecution's motion is untimely according to the Local Rules. It was filed one day after the time for such a motion had expired.

But, after the time for filing of a defense motion for reconsideration had passed, this court no longer had jurisdiction to even grant a new trial under the Local Rules, and that time had lapsed when the parties met here in open court, on August 8th.

This court is bound by the Local Rules as well as the Federal Rules of Criminal Procedure which "make no provision for rehearing and modifying or setting aside an order entered through mistake." *United States* v. *Farrah*, 715 F.2d 1097, 1099 (6th Cir. 1983), *quoting United States* v. *Jerry*, 487 F.2d 600, 604 (3rd Cir. 1973). In *Farrah*, the prosecution filed a petition for rehearing two weeks after the court had permitted the defendant to withdraw his guilty plea because defendant contended that he had not fully understood the penalty he could possibly receive for the offense to which he pleaded guilty. At the conclusion of the hearing on the motion to reconsider, the district court judge reversed his decision to withdraw his plea and reinstated the guilty plea. The *Farrah* court cited *Jerry* and held that the district court did have the

authority to reconsider its order and that the court had correctly rescinded its order permitting the defendant to withdraw his plea since the record showed that defendant did understand correctly the length of incarceration he faced.

By analogy, this court holds that it does have the authority to vacate its order of August 12, 1985 and justice requires that this court vacate the order. There is uniform case law that a court does not have jurisdiction to grant an untimely motion for new trial or a subsequent motion regarding a new trial that is untimely. As the court was without jurisdiction, the order granting the motion was *sua sponte* and such orders are prohibited. *United States* v. *Smith*, 331 U.S. 469, 475 (1947); *United states* v. *Mills*, 54 FRD 497, 498 (D.C. Tenn.), *aff'd*, 456 F.2d 1111 (6th Cir. 1972). The notes of the advisory committee which follow Rule 33 of the Federal Rules of Criminal Procedure expressly preclude *sua sponte* orders for new trials. Thus, this court's order of August 12, 1985 is a nullity. *United States* v. *Green*, 414 F.2d 1174, 1175 (D.D.C. 1969).

IT IS HEREBY ORDERED that for the reasons stated in this order, the court grants the government's motion for reconsideration, vacates its order of August 12, 1985, and reinstates the order of July 23, 1985 which denied defendants' motion for new trial.

IT IS SO ORDERED.

/s/ ANNA DIGGS TAYLOR
U.S. District Judge

Dated: November 12, 1985

Nos. 86-1784 and 86-1785

In the Supreme Court of the United States

OCTOBER TERM, 1987

SANFORD COHL AND CHARLES GREGORY, SR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL COHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's delayed disclosure of alleged *Brady* material entitles petitioners to a new trial.

2. Whether the district court properly vacated its sua sponte order granting petitioners a new trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1784

SANFORD COHL AND CHARLES GREGORY, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 86-1785

MICHAEL COHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. D1-D3)[1] is reported at 812 F.2d 1408 (Table).

[1] "Pet. App." refers to the appendix to the petition for a writ or certiorari in No. 86-1784.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1987. A petition for rehearing was denied on March 6, 1987 (Pet. App. E1). The petition for a writ of certiorari in No. 86-1784 was filed on May 4, 1987, and the petition in No. 86-1785 was filed on May 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners Michael Cohl and Charles Gregory, Sr., were convicted on 14 counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314. Petitioner Sanford Cohl was convicted on two counts of that offense. Each petitioner was also convicted of conspiracy, in violation of 18 U.S.C. 371. Michael Cohl was sentenced to concurrent four-year terms of imprisonment on each count, and Gregory and Sanford Cohl were sentenced to concurrent three-year terms of imprisonment on each count. In addition, Michael and Sanford Cohl were each fined a total of $30,000, and Gregory was fined $10,000. The court of appeals affirmed in a per curiam opinion (Pet. App. D1-D3).

1. The evidence at trial showed that petitioners owned and operated SMC Hauling Company. On October 9, 1978, SMC entered into a contract with Jones & Laughlin Steel Corporation whereby SMC agreed to haul away slag from Jones & Laughlin's steel mill. In return, SMC was entitled to remove stainless steel from the slag and to sell it, subject to Jones & Laughlin's right of first refusal (2 Tr. 198-203). Under

the contract, stainless steel ingot "butts"—residual metal from partially filled ingot molds—were not to be removed from the plant. Stainless steel "caps"—residual metal recovered from the molten slag—could be removed if they were not first picked out by designated Jones & Laughlin employees, who received incentive pay to recover steel from the slag (2 Tr. 77; 3 Tr. 22-23; 7 Tr. 65). Large caps, which were almost as valuable as ingot butts and which could be easily seen in and picked from the slag, were expected to be reclaimed by the Jones & Laughlin employees, not by SMC (2 Tr. 86, 116, 202-208; 3 Tr. 19, 22-23, 50).

From late 1977 to 1982, SMC made payments to various Jones & Laughlin employees who, in turn, left butts and large caps in the slag for SMC to remove (*e.g.*, 3 Tr. 116-120; 4 Tr. 106-108, 110-117, 119-120, 128; 7 Tr. 74-77). To conceal the resulting thefts, SMC offered few, if any, of the large pieces of steel for sale to Jones & Laughlin, despite the latter's right of first refusal under the contract (2 Tr. 86; 4 Tr. 252-253; 8 Tr. 133-134). Instead, petitioners sold the stolen ingot butts and large caps to out-of-state companies through other companies owned by petitioners (6 Tr. 41-43, 65-83; 7 Tr. 10, 12, 22, 25; GXs 2-6, 8-16, 25-27, 33-37, 39-45).

2. At trial, the government elicited testimony from Norman Reese, the SMC foreman who had supervised the various interstate shipments of stolen property, to establish that each shipment had a value in excess of $5,000, as is required by 18 U.S.C. 2314. Reese correlated the weight of each shipment of stainless steel, as set forth in the invoice, with its contents (6 Tr. 66-92). He stated that one shipment could have

been "butt ends, a few small caps" (*id.* at 67), and he described the remaining shipments as butt ends, ingots, or both (*id.* at 68-92). On cross-examination, Reese described the shipments as mainly 2,000 to 4,000 pound butt ends (*id.* at 178-192). He further testified that SMC did not ship caps mixed with butt ends (*id.* at 178-179).

On the third day of jury deliberations, the jury asked a question that prompted a meeting of the parties. During an off-the-record conversation with defense counsel, the prosecutor mentioned that Reese previously had indicated that some of the shipments contained caps. Defense counsel took no action in response to that disclosure, and the jury returned its verdicts shortly thereafter. Two weeks later, on June 19, 1985, petitioners moved for a new trial under Fed. R. Crim. P. 33 on the ground that the government had failed to disclose Reese's allegedly inconsistent prior statement (86-1784 Pet. 5). See *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court denied that motion on July 23, 1985, concluding that "there is no reasonable probability that the questioned non-disclosed evidence would have affected the outcome of the trial" (Pet. App. A1).

Seventeen days later, on August 8, 1985, the court reconvened the parties and announced that it had determined, sua sponte, to reconsider its order. The court granted petitioners a new trial, apparently believing that this Court's recent decision in *United States* v. *Bagley*, 473 U.S. 667 (1985), required that result. See Pet. App. C1.[2] Thereafter, the gov-

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[2] In *Bagley*, this Court held that a prosecutor's failure to disclose *Brady* material does not require a new trial unless the evidence is material (473 U.S. at 678-679). The Court

ernment moved for reconsideration of the court's decision, arguing that the court lacked jurisdiction to order a new trial sua sponte. The district court agreed and vacated its order (Pet. App. C1-C4).

3. On appeal, petitioners argued that the government's failure to furnish them with Reese's prior statement entitled them to a new trial. They also argued that the district court erred in vacating its sua sponte order granting a new trial. The court of appeals rejected the *Brady* claim, concluding that petitioners had "failed to demonstrate either the error they seek to raise, or the materiality of, or prejudice from, the tardy disclosure" (Pet. App. D2). It noted that the prosecutor's revelation concerning Reese's prior statement was made in the course of an off-the-record conversation, which petitioners made no attempt to preserve on the record (*ibid.*). The court further observed that "no effort was made by defense counsel before the jury returned its verdict to either reopen the case, or to have the trial court declare a mistrial" (*ibid.*) The court of appeals also affirmed the district court's vacation of its sua sponte order, stating that "[t]he district court correctly comprehended its inability to grant a new trial in the absence of a motion from a defendant" (*ibid.*).

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further held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (*id.* at 682; *id.* at 685 (White, J., concurring)).

ARGUMENT

1. Petitioners first reassert their contention that the government violated the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing promptly to inform them of a government witness's prior inconsistent statement (86-1784 Pet. 7-12; 86-1785 Pet. 8-13). The court of appeals and the district court both correctly rejected that contention.

The government has an obligation to disclose evidence "that is both favorable to the accused and 'material either to guilt or punishment' " (*United States* v. *Bagley*, 473 U.S. at 674 (quoting *Brady*, 373 U.S. at 87)). The *Brady* disclosure requirement is intended to prevent the "miscarriage of justice" that might occur if a defendant were denied access to exculpatory evidence during trial (*Bagley*, 473 U.S. at 675-676). Petitioners contend that those principles were violated in this case because the government denied them access to *Brady* material until after the jury had retired to render its verdict. But the claim of a *Brady* violation here is highly dubious. As we explain below, the allegedly exculpatory evidence was, if anything, inculpatory and had only minimal impeachment value. Indeed, petitioners themselves apparently attached little significance to Reese's prior statement when they learned of it during the trial. As the court of appeals observed (Pet. App. D2), petitioners made no effort to preserve the statement in the record, to reopen the case prior to the jury's verdict, or to seek a mistrial.[3]

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[3] The courts of appeals generally agree that "[i]f previously undisclosed evidence is disclosed during trial, no *Brady* violation occurs unless the defendant has been prejudiced by

But even if the government's nondisclosure amounted to a *Brady* violation, and even if petitioners were not obligated to raise an objection prior to the jury's verdict, the supposed violation would not justify a new trial. A *Brady* violation requires reversal of an otherwise lawful conviction only if the undisclosed information is material in the sense that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. at 682; *id.* at 685 (White, J., concurring). After reviewing the information at issue in the context of the evidence at trial, the court of appeals correctly concluded that petitioners failed to demonstrate "the materiality of, or prejudice from, the tardy disclosure" (Pet. App. D2). That largely factual determination does not warrant further review.

As we have explained, the government accused petitioners of stealing and transporting stainless steel scrap. At trial, Reese described the various shipments and made several statements suggesting, albeit ambiguously, that one shipment contained stainless steel

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the delay in disclosure." *United States* v. *Holloway*, 740 F.2d 1373, 1381 (6th Cir.), cert. denied, 469 U.S. 1021 (1984); see, *e.g.*, *United States* v. *McKinney*, 758 F.2d 1036, 1049-1050 (5th Cir. 1985); *United States* v. *Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980). The government's disclosure of *Brady* information after the jury has retired may, in some cases, result in incurable prejudice. See *Hamric* v. *Bailey*, 386 F.2d 390 (4th Cir. 1967). But the question whether the claimed prejudice can be overcome should first be directed to the district court prior to the jury's verdict. The defendant has an obligation to raise its objection at that time, rather than to save the objection so as to preserve it for a subsequent appeal.

caps and the other shipments contained stainless steel ingot butts. Reese's lack of specificity was understandable; the actual form of the stainless steel was a technical matter of little interest to the prosecution or the defense. The supposedly exculpatory evidence —Reese's prior statement that more than one of the shipments contained caps—was likewise immaterial to the question of guilt or innocence. Indeed, the pretrial statement, if anything, was wholly consistent with the indictment and supported petitioners' guilt.[4]

Furthermore, Reese's statements had only minimal impeachment value, at best. As noted above, Reese testified at trial that one of the shipments could have included caps (6 Tr. 67). And he indicated on cross-examination that he was unsure of the exact form of the stainless steel in various shipments (*id.* at 178-193). Thus, there was little discrepancy between his trial testimony and his pretrial statement. Moreover, petitioners thoroughly challenged Reese's credibility on a number of other grounds, questioning him about his status as an immunized witness; his part in the theft of stainless steel from SMC; and other allegedly inconsistent prior statements he made concerning the weight of the scrap steel, the paperwork for the shipments, and the amount of the bribes paid to the Jones & Laughlin employees (see *id.* at 107-222). Thus, any discrepancy between Reese's trial testimony and the particular pretrial statement at issue here could

[4] Significantly, petitioners did not seek to distinguish between ingot butts and caps at trial; instead, they defended on the ground that they had a good-faith belief that they were entitled to *all* the stainless steel pieces (1 Tr. 160, 164-165, 167, 186-187, 195-196; 11 Tr. 117, 141-144, 148-149, 158). As counsel for Gregory stated to the jury (11 Tr. 122), under the defense theory "all the counts are the same."

not have supplemented petitioners' impeachment efforts in any significant way.

Finally, the other evidence of petitioners' guilt, which included testimony from various participants in the scheme, was compelling. Given the strength of the government's case, there is no reasonable probability that, had Reese's pretrial statement been made available to petitioner earlier in the trial, the result of the proceeding would have been different. Indeed, petitioners' failure to seek a pre-verdict remedy directly undermines their present contention that the disclosure could have changed the result of the trial.[5]

2. Petitioners also contend that the district court erred in vacating its sua sponte order granting them a new trial (86-1784 Pet. 12-14; 86-1785 Pet. 13-15). The court of appeals correctly concluded that the district court acted properly in vacating that order (Pet. App. D2).

The Federal Rules of Criminal Procedure provide that the district court may grant a new trial "on motion of a defendant" (Fed. R. Crim. P. 33). The Rules "make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant." Fed. R. Crim. P. 33 advisory committee note (1966 Amendment). See, *e.g.*, *United States* v. *Brown*, 587 F.2d 187, 189 (5th Cir. 1979); *United States* v.

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[5] Contrary to petitioners' suggestion, this case does not involve the solicitation of false testimony by the government. Petitioners have not shown that Reese's testimony was false, and the government took the position in the district court that Reese's sworn testimony at trial in the presence of his former employees deserved more credence than his informal, unrecorded, and unratified out-of-court statement. Government's Answer in Opposition to Defendants' Motion for New Trial at 7.

Green, 414 F.2d 1174, 1175 (D.C. Cir. 1969). Here, petitioners made a timely motion for a new trial, the district court denied it (Pet. App. A1), and petitioners did not make a motion for reconsideration following the denial. The district court's subsequent order granting a new trial (*id.* at B1-B2) was made in the absence of a defense motion and was therefore invalid. Once informed of that defect, the district court promptly vacated its order (*id.* at C1-C4), and the court of appeals properly affirmed that result (*id.* at D2). Both courts recognized that Fed. R. Crim. P. 33 unambiguously prohibits a sua sponte order granting a new trial.

Petitioners contend that the Rule 33 prohibition should not apply here because the purpose of the rule is to obviate the double jeopardy problems that would arise if trial judges could grant new trials in the absence of a defense motion (see Fed. R. Crim. P. 33 advisory committee note (1966 Amendment)) and because they clearly would have welcomed a new trial in light of their initial Rule 33 motion. But Rule 33, by its express terms, does not permit such exceptions. Rather, it was intended to serve the more general purpose of precluding unilateral judicial second-guessing of the jury's verdict. In any event, there is no clear distinction, for double jeopardy purposes, between a court's granting "reconsideration" of a new trial motion in the absence of a timely request for reconsideration and the court's granting a new trial sua sponte after previously denying a separate motion for a new trial. Acceptance of petitioner's theory would therefore create an ill-defined and unmanageable exception to a presently clear rule.[6]

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[6] Petitioners' reliance on *United States* v. *Spiegel*, 604 F.2d 961, 971 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980), is

Finally, denial of the new trial motion was clearly the correct result quite apart from the question whether the district court had jurisdiction to grant the motion in the absence of a motion by petitioner. As the court of appeals pointed out, and as we have discussed above, the pretrial statement that was withheld in this case was inconsequential, and the prosecutor's failure to disclose that statement until late in the trial could not have affected the outcome of the case. Accordingly, it would have been error for the district court to grant a new trial motion even if the district court had had jurisdiction. Any error on the part of the district court and the court of appeals with respect to the jurisdictional question therefore did not result in the denial of any relief to which petitioners were otherwise entitled.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
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JULY 1987

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misplaced. There, the court of appeals held that the district judge had jurisdiction to reconsider his grant of a new trial pursuant to a timely motion for reconsideration by the government (604 F.2d at 971). Thus, *Spiegel* did not involve sua sponte action by the court.

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No. 86-1785

In The Supreme Court of the United States

October Term, 1987

MICHAEL COHL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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No. 86-1785

In The Supreme Court of the United States

October Term, 1987

MICHAEL COHL,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

REPLY MEMORANDUM FOR PETITIONER

The "Brief For the United States In Opposition" was filed on July 10, 1987 and served on Petitioner on August 17, 1987. Petitioner offers the following in reply to arguments made by Respondent:

1. Respondent's argument is premised on the claim that it did not matter whether "caps" or "ingot butts" were removed from J & L and shipped in interstate commerce. Thus, Respondent asserts that "the actual form of the stainless steel was a technical matter of little interest to the prosecution or the defense" and that whether shipments contained caps was "immaterial to the question of guilt or innocence." "Brief

For The United States In Opposition'' at 8. The record does not support Respondent's position.[1]

Robert M. Visokey was plant manager at J & L Steel's Warren plant and negotiated the contract between J & L and SMC. (T. 5/1/85: 196–197) Visokey testified that ''caps'' were a type of pit scrap that was included in the contract. (T. 5/2/85: 22) Although Visokey claimed that ''large'' caps should have been reclaimed by J & L employees, he admitted there was no ''exact break'' between large and small caps and that the company ''would not have been overly alarmed'' if caps were received by SMC and resold to J & L. (T. 5/2/85: 48, 50)

The distinction between ''ingot butts'' and ''caps'' was clearly made by Visokey in his response to the prosecutor's questions:

Q. Now, you indicated that — or I asked you if [Michael Cohl] had made any claim to ingot butts.

A. He did not.

Q. Was there any dispute as to — or did he state anything to the nature, he should be getting large buttons or caps?

A. I don't recall that there was any discussion above size per se. I think it more related to quantity, which would convert to revenue, rather than size of an individual piece.

Q. During the entire course of these negotiations and afterwards in your subsequent contact with Mr. Cohl

[1] Respondent notes that ''petitioners did not seek to distinguish between ingot butts and caps at trial'' and that counsel for co-defendant Gregory stated to the jury that ''all the counts are the same.'' (''Brief For The United States In Opposition, at 8, n.4) Respondent, having concealed evidence that the shipments contained caps as well as ingot butts at trial, now attaches significance to Petitioner's failure to argue evidence to the jury that was concealed from him until it was too late to do so.

or any other member of SMC, can you recall anything that was stated that would indicate that they had any right to ingot butts or caps?

A. Ingot butts or caps?

Q. Yes.

A. They're separate.

Q. I'm sorry. Ingot butts are large — well, let me say, first of all, ingot butts.

A. *Ingot butts, as an issue, clearly from my viewpoint and the company's viewpoint, were absolutely outside this contract.* They were never contemplated to be taken or sold or bought back. We don't do those things as a business practice, absolutely not.

Caps, certainly, caps come from a refuse stream, if you will, the slag-end of the business. It is very conceivable and we did discuss caps. *Caps in general were a type of scrap, a type of pit scrap that was in the contract.*

The question of caps becomes as to the size, not — not the — that physically they were not included; they were included in the contract. That is part of pit scrap. Ingot butts are not.

(T. 5/2/85: 21-23) (emphasis supplied)

If "caps" were mixed with "ingot butts" in shipments that SMC sent out-of-state for sale — as Norman Reese told the prosecutor but denied before the jury — the prosecution could not establish that any particular shipment contained over $5,000 worth of stolen stainless steel. The mixing of "ingot butts" and "caps" in shipments would make it impossible for Reese to discern how much of each load was stolen steel, *i.e.*, "ingot butts", and how much was scrap steel allowed to be taken under the contract, *i.e.*, "caps". The $5,000 jurisdictional amount, required for conviction under 18 U.S.C. Section 2314, could not have been established.

As found by the district court[2], a new trial is required. A reasonable probability existed that, "had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Petitioner was entitled to disclosure of Reese's statement in time to use it at trial. Having been denied the information when it should have been disclosed, Petitioner is now entitled to a new trial.

2. Respondent denies this case involves the solicitation of false testimony by the government attorney. It restates the position taken in the district court "that Reese's sworn testimony at trial in the presence of his former employees deserved more credence than his informal, unrecorded, and unratified out-of-court statement." ("Brief For The United States In Opposition" at 9, n.5)

Respondent's claim that Reese's trial testimony "deserved more credence" than his earlier statement is unconvincing. Reese was no longer employed by SMC at the time of his trial testimony. He admitted that he had received $5,000 for his part in stealing from Petitioner's company. (T. 5/22/85:102) He had been granted complete immunity in exchange for his testimony. (T. 5/21/85: 156) Reese's position at trial was clearly that of an adversary to Petitioner.

The prosecutor undoubtedly preferred the version Reese gave on the witness stand to the earlier version he had given. There is, however, no suggestion by Respondent as to what

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[2] Respondent's assertion that the "court of appeals and the district court both correctly rejected" ("Brief For The United States" at 6) the contention that the government violated Petitioner's rights by failing to disclose exculpatory evidence is misleading. After initially denying Petitioner's new trial motion, the district court reconsidered the matter and found a new trial was required. The district court ultimately denied Petitioner a new trial only because it believed it had no jurisdiction to do so. (Pet. App. E)

motive Reese had to lie to the prosecutor and his case agent when he told them, before trial, that "caps" and "ingot butts" were mixed in the out-of-state shipments. It appears that the trial testimony was considered more "truthful" by the prosecutor simply because it assisted him in obtaining his conviction.

Regardless of whether the prosecutor believed that the testimony was true, however, it was not for him to decide whether Reese had lied at trial or before trial. The jury, not the prosecution, should have been permitted to make that determination. The prosecutor withheld information that he knew was contradictory to the favorable testimony he elicited from Reese on the witness stand. He was obligated to provide Petitioner with that information and allow the jury to determine where the truth lied.

3. No evidentiary hearing has ever been conducted regarding the allegations that the prosecutor committed misconduct in failing to provide timely disclosure of the statements by Norman Reese.

Respondent maintains that Reese's trial testimony has not been shown to be false. ("Brief For The United States In Opposition," at 9, n.5) However, no opportunity has ever been afforded Petitioner to confront Reese with his earlier statement in an effort to establish that his trial testimony was false.

Respondent restates the government's position in the district court that they did not intentionally solicit false testimony from Reese. (*Id.*) Yet, no record has been made that would establish that the government trial attorney reasonably believed Reese had lied to him before trial but was testifying truthfully at trial.

Respondent asserts that Petitioner and his co-defendants "apparently attached little significance to Reese's prior statement when they learned of it during trial." (*Id.* at 6) There is,

however, no record as to exactly what defense counsel were informed or what options, if any, were considered available to them at the time of the disclosure.[3]

Petitioner was denied a fair trial by the withholding of highly material, exculpatory evidence until it was too late to be of any use to him. This was recognized by the district court when it granted Petitioner a new trial. In the appellate courts, however, the government has relied on a lack of record regarding the prosecutor's motives, defense counsel's actions, and the actual truth or falsity of Reese's trial testimony in an effort to defend the misconduct that occurred here.

This case should be decided on the record rather than Respondent's self-serving speculations. Any uncertainties as to the facts should be resolved by a remand to the district court rather than reliance upon the unsupported assertions of Respondent.

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[3] The suggestion that defense counsel failed to preserve the issue for appeal begs the question. Defense counsel were first made aware of Reese's earlier contradictory statement on the fourth day of jury deliberations, sometime between 9:10 a.m., when a question from the jury was considered, and 10:45 a.m., when the jury returned its verdict. (T. 6/5/85: 5; Motion For New Trial, C.A. 94) The prosecutor's revelations came over one month after he had assured the district court that defense counsel had been told of statements that came to his attention during his pretrial interview of witnesses (T. 5/2/85: 27) and more than two weeks after Reese had testified that "ingot butts" and "caps" were not mixed in out-of-state shipments. (T. 5/22/85: 178, 182)

For these reasons and those set forth in the petition, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: September, 1987